RECORD
AND
BRIEFS

No. 16-254

In the Supreme Court of the United States

WATER SPLASH, INC.,

Petitioner,

v.

TARA MENON,

Respondent.

On Writ of Certiorari to the
Fourteenth Court of Appeals, Houston, Texas

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT IN REPLY 1

I. The view that "send" means or includes "serve" follows from *stare decisis* and intrinsic evidence. 1

A. *Stare Decisis* 1

B. Intrinsic Evidence 3

II. Menon's view that "send" means "service of post-answer documents" is unreasonable. 11

A. The text of the Convention does not distinguish between service of process and service of post-answer documents. 12

B. Menon's view is also based on unsupported assumptions regarding the meaning of other Convention terms. 14

III. When interpreting an unclear treaty, extrinsic evidence should not be displaced by a canon of construction. 18

IV. If the court of appeals' decision is reversed, remand is procedurally appropriate. 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Chabert v. *Bacquie*,
694 So. 2d 805 (Fla. Dist. Ct. App. 1997) 17

Chan v. *Korean Air Lines, Ltd.*,
490 U.S. 122 (1989) 19

Combs v. *Nick Garin Trucking*,
825 F.2d 437 (D.C. Cir. 1987) 4

Eastern Airlines, Inc. v. *Floyd*,
499 U.S. 530 (1991) 20

Factor v. *Laubenheimer*,
290 U.S. 276 (1933) 20

Hilton v. *S.C. Pub. Railways Com'n*,
502 U.S. 197 (1991) 3

Jones v. *Flowers*,
547 U.S. 220 (2006) 10

Katy Venture, Ltd. v. *Cremona Bistro Corp.*,
469 S.W.3d 160 (Tex. 2015)..... 4

Lugosch v. *Pyramid Co. of Onandaga*, 435
F.3d 110 (2d Cir. 2006)..... 15

Marx v. *Gen. Revenue Corp.*,
133 S. Ct. 1166 (2013) 3

Maximov v. *United States*,
373 U.S. 49 (1963) 19

Medellin v. *Dretke*,
544 U.S. 660 (2005) 3

Peralta v. *Heights Med. Ctr., Inc.*,
485 U.S. 80 (1988) 10

TABLE OF AUTHORITES – CONTINUED

Page(s)

Richlin Sec. Serv. Co. v. *Chertoff*,
553 U.S. 571 (2008) 10, 20

Russello v. *United States*,
464 U.S. 16 (1983) 10, 11, 20

Sumitomo Shoji America, Inc. v. *Avagliano*,
457 U.S. 176 (1982) 19

United States Postal Serv. v. *Council of Greenburgh Civic Associations*,
453 U.S. 114 (1981) 6

United States v. *Harriss*,
347 U.S. 612 (1954) 22

United States v. *Martin*,
395 F. Supp. 954 (S.D.N.Y. 1975) 4

United States v. *Percheman*,
7 Pet. 51, 89, 8 L.Ed. 604 (1833) 3

Utility Air Regulatory Group v. E.P.A.,
134 S. Ct. 2427 (2014) 13

Volkswagenwerk Aktiengesellschaft v. *Schlunk*, 486 U.S. 694 (1988) ..... *passim*

Treaties, Constitutions, and Rules

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) (English),
20 U.S.T. 361 (1969) ..... *passim*

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) (French), *available at* https://www.hcch.net/fr/instruments/conventions/full-text/?cid=17 16

TABLE OF AUTHORITES – CONTINUED

Page(s)

FED. R. CIV. P. 4 8

FED. R. CIV. P. 4.1 14

FED. R. CIV. P. 5 14

TEX. R. CIV. P. 21a 14

TEX. R. CIV. P. 103 8

TEX. R. CIV. P. 629 14

U.S. CONST., Art. VI 21

Vienna Convention on the Law of Treaties (1969), 1115 U.N.T.S. 331 20

Other Authorities

BLACK'S LAW DICTIONARY (10th ed. 2014) 15, 21

COLLINS FRENCH-ENGLISH DICTIONARY, *available at* https://www.collinsdictionary.com 16

Hague Conference on Private International Law, Permanent Bureau, *Practical Handbook on the Operation of the Service Convention* (4th ed. 2016) 3, 5, 17

J. Gregory Sidak & Daniel F. Spulber, *Monopoly and the Mandate of Canada Post*, 14 YALE J. ON REG. 1 (1997) 7

United States Postal Service, *Universal Service and the Postal Monopoly: A Brief History (2008), available at https://about.usps.com/universal-postal-service/universal-service-and-postal-monopoly-history.pdf* 7

ARGUMENT IN REPLY

Water Splash's opening brief argued that Article 10(a) of the Hague Service Convention permits service of process by mail based on: (1) intrinsic evidence of intent (at 19-20, 24-26); (2) this Court's decision in *Schlunk*[1] (at 20-22); and (3) extrinsic evidence of the signatories' shared expectations (at 26-39). Against this, much of Menon's response brief argues that the Court may not consider such extrinsic evidence if a treaty's text is wholly unambiguous. Resp. Br. at 7-28; 36-45.

Menon's argument is a red herring because even without examining extrinsic evidence in this case, points (1) and (2), both independently and together, demonstrative that Water Splash's reading is at least reasonable. Accordingly, there is no need to rely on extrinsic evidence *unless* the Court determined that Menon's interpretation (or another) was also reasonable, thus resulting in an ambiguity. But in that event, Menon does not deny that the Court may consider extrinsic evidence, essentially all of which supports Water Splash (a point Menon does not try to refute). Thus, for Menon to prevail, she must show that Water Splash's interpretation is unreasonable *and* that her interpretation is reasonable. But as discussed herein, Menon cannot show either.

I. The view that "send" means or includes "serve" follows from *stare decisis* and intrinsic evidence.

A. *Stare Decisis*

In *Schlunk*, this Court examining the drafting history of the Convention and noted that "[t]he delegates

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[1] 486 U.S. 694 (1988).

. . . criticized the language of the preliminary draft because it suggested that the Convention could apply to transmissions abroad that do not culminate in service." *Schlunk*, 486 U.S., at 701. The Court then concluded that:

> The final text of Article 1, . . . eliminates this possibility and applies only to documents transmitted for service abroad. The final report (*Rapport Explicatif*) confirms that the Convention does not use more general terms, such as delivery or transmission, to define its scope because it applies only when there is both transmission of a document from the requesting state to the receiving state, and service upon the person for whom it is intended.

Ibid.

Given this limited scope of the Convention, it is at least reasonable to read Article 10(a)'s reference to the transmittal of judicial documents abroad as a means for effectuating service, even though the drafters used "send" (a broad verb) rather than "serve" (a narrower term of art). Indeed, given this limited scope, Article 10(a) would be superfluous if "send" excluded the concept of "service." Pet. Br. at 20-22.

To be sure, the decision in *Schlunk* was based in part on the drafting history of the Convention, which is extrinsic evidence. However, Menon takes no issue with that. Resp. Br. at 39 ("There was an ambiguity as to whether the forum State or the receiving State decides if the Convention applies, and therefore, the Court [in *Schlunk*] resorted to extra-textual materials to answer the question.").

Although this Court could decide to revisit

Schlunk, Menon does not argue in favor of that, and general principles of *stare decisis* counsel against it. See *Hilton* v. *S.C. Pub. Railways Com'n*, 502 U.S. 197, 202 (1991) ("Time and time again, this Court has recognized that the doctrine of *stare decisis* is of fundamental importance to the rule of law." (internal quotation marks omitted)).[2] As such, *Schlunk*'s determination of the scope of the Convention, both alone and in conjunction with the canon that legal instruments should be construed to avoid rendering provisions superfluous,[3] provides at least a reasonable basis for Water Splash's interpretative position without resort in this case to extrinsic evidence.

B. Intrinsic Evidence

Alternatively, even if the scope of the Convention were not limited to the regulation of transmittals for effectuating service, any reading of "send" that excluded the concept of "service" would still render meaningless a State's right to object in Article 10(a) to the use of the mails because there is no cognizable basis for a State to object to a litigant using its postal

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[2] See also Hague Conference on Private International Law, Permanent Bureau, *Practical Handbook on the Operation of the Service Convention* 15 ¶ 37 (4th ed. 2016) (stating that *Schlunk*'s holding was "broadly accepted" at the 1989 Special Commission meeting); cf. *Medellin* v. *Dretke*, 544 U.S. 660, 689 (2005) (O'Connor, J., dissenting from dismissal of writ as improvidently granted) ("In the past the Court has revisited its interpretation of a treaty *when new international law has come to light*." (citing *United States* v. *Percheman*, 7 Pet. 51, 89, 8 L.Ed. 604 (1833) (emphasis added)).

[3] See *Marx* v. *General Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

channels *solely for non-service purposes*. Pet. Br. at 24-26. Against this, Menon claims that this right of objection does have meaning:

> The response to [Water Splash's] argument is simple: the penalty for use of mail to ***serve*** any document when a use-of-mail objection has been lodged would be non-enforcement of documents sent by mail from the forum State.

Resp. Br. at 34 (emphasis added).[4] But this proves Water Splash's point: namely, that the only cognizable purpose of a State's right to object under Article 10(a) is to prevent judicial documents sent by mail from having legal effect as a properly served document. Yet if Article 10(a) precluded service by mail (*i.e.*, because "send" does not mean or include "serve") then any

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[4] Menon's quoted statement regarding the "non-enforcement of documents" is primarily directed at "non-service-of-process" ("post-answer") documents. Resp. Br. at 30, 33. And certainly, a failure to properly service post-answer documents might be penalized *within* a proceeding. But assuming valid service of process, it is unclear whether a party could expect to obtain relief from a final judgment simply because some post-answer documents were not properly served. The Convention only limits the entry or finality of default judgments in connection with situations involving a writ of summons or equivalent. See Convention, Arts. 15, 16 (J.A. 10-12). Federal law provides relief from a final judgment based on ineffective service of process. See *Combs* v. *Nick Garin Trucking*, 825 F.2d 437, 442 & n. 42 (D.C. Cir. 1987). Texas law also provides relief for lack of service of process, as well as lack of notice of a default judgment itself. See *Katy Venture, Ltd.* v. *Cremona Bistro Corp.*, 469 S.W.3d 160, 163-64 (Tex. 2015). But Water Splash is otherwise unaware of a general basis to avoid a final judgment based on a plaintiff's failure to serve other documents. Cf. *United States* v. *Martin*, 395 F. Supp. 954, 960 (S.D.N.Y. 1975) (holding that defendant could not avoid default judgment despite United States' failure to give notice of application for, or entry of, default judgment).

need for a State to object in order to prevent such documents from having legal effect vanishes because, under that interpretation, documents cannot be sent by mail for service in the first place.

Consistently, the Conference's Special Commission of 1977 concluded that, even where a State had objected to the use of mail under Article 10(a), a party may still use mail for non-service purposes:

> "An objection to postal channels as a means of service does not extend to a situation where the postal channels are used as a mere supplement to another form of service. The Special Commission of 1977 held that in such a case, the use of postal channels should not be treated as an infringement of the sovereignty of the State of destination, and thus should be accepted, notwithstanding an objection to Article 10(a)."

Hague Conference on Private International Law, Permanent Bureau, *Practical Handbook on the Operation of the Service Convention* 83 ¶ 260 (4th ed. 2016) (hereinafter, "PRACTICAL HANDBOOK (2016)").

To be clear, the above reference is relevant not simply as extrinsic evidence of the signatories' shared expectations, but rather to show the reasonableness of Water Splash's structural argument: namely, that the use of mail for non-service purposes "should not be considered as being an infringement on the sovereignty of the State addressed," *ibid.*, in the first place, and thus the right to object in Article 10(a) has no cognizable purpose if "send" does not at least include "service." Rather, as the Special Commission reasoned, even with an objection, parties could use the mails for non-service transmittals, which would be just as true if the Convention never existed. The right to object is

superfluous if "send" excludes "service."

Menon also argues that the use of the mails for service is contrary to some of the stated purposes of the Convention:[5] namely, the Conference's desire "to improve the organization of mutual judicial assistance" in connection with "simplifying and expediting the procedure" for ensuring timely notice of judicial documents. Resp. Br. at 32-33 (quoting Convention, Preamble (J.A. 5)); see also Resp. Br. at 33 (describing "mutual judicial assistance" in terms of "cooperation between the governmental channels of the receiving and requesting nations"). Menon specifically contends that there is "nothing about these dual purposes [in the preamble] that contemplates complete removal of governmental involvement in the initiating service of process procedures," which Menon views as the effect of "direct mail without government assistance." Resp. Br. at 28, 33.

But service of process by mail does not eliminate the government's role in initiating or assisting with service. Indeed, when drafted in 1964, the Convention's use of the term "postal channels" in Article 10(a) was clearly a reference to the longstanding communication systems operated or regulated by governments, not private enterprise.[6]

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[5] Menon argues that focusing on a treaty's purpose "shifts the law-making function from the political branch to the judicial branch." Resp. Br. at 12. But if purpose is determined by a valid interpretative method and if it limits the reasonable scope of an instrument, it at least provides a valid context for understanding the instrument's provisions.

[6] See *United States Postal Serv.* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114, 121 (1981) ("By the early 18th cen-

In other words, "postal channels" are "governmental channels." Consistently, the Convention uses the term "channels" in connection with both "postal" channels (Article 10) as well as with two other government channels of transmission outside the Central Authority mechanism. See Convention, Arts. 9, 10 (J.A. 8-9). (referencing diplomatic and consular channels). The Convention also refers collectively to these three governmental channels as "channels of transmission" (Art. 11)[7] and "methods of transmission" (Art. 21). J.A. 9, 13.

In addition, with respect to service of process by mail, the initiating judicial document (the summons) issues from a governmental entity, not a private party, and is then mailed via postal channels to the defendant. Depending on forum law, this may also involve further governmental action beyond the postal

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tury, the posts were made a sovereign function in almost all nations because they were considered a sovereign necessity."). In the United States, the Postal Service's monopoly on delivery of time-sensitive documents ("letters") existed until 1979. See United States Postal Service, *Universal Service and the Postal Monopoly: A Brief History* (2008), *available at* https://about.usps.com/universal-postal-service/universal-service-and-postal-monopoly-history.pdf. Similarly, the Canada Post was an office of the government before becoming a Crown Corporation in 1981. See J. Gregory Sidak & Daniel F. Spulber, *Monopoly and the Mandate of Canada Post*, 14 YALE J. ON REG. 1, 6 (1997).

[7] Indeed, Article 11 provides that "[t]he present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, *channels of transmission other than those provided for in the preceding articles* and, in particular, direct communication between their respective authorities." J.A. 9 (emphasis added). Contextually, this also indicates that the previously mentioned governmental channels (consular, diplomatic, and postal) were channels for service.

channels.[8]

Menon argues that allowing service by mail is likely to result in enforceable judgments against defendants who had no notice of the underlying proceeding and that such a result is both contrary to one of the concerns giving rise to the Convention as well as bad policy. Resp. Br. at 46. Menon's supports this with the following statement from the concurrence in *Schlunk*:

> "a forum nation could prescribe direct mail service effective upon deposit in the mailbox, or could arbitrarily designate a domestic agent for any foreign defendant and deem service complete upon receipt domestically by the agent even though there is little likelihood that service would ever reach the defendant."

Schlunk, 486 U.S., at 707 (Brennan, J., concurring).

But in that statement, the phrase "little likelihood that service would ever reach the defendant" is a reference to service on an "arbitrarily designated domestic agent." The reference to service by mail is just another example of how a forum might avoid the Convention altogether by authorizing means of service that became effective *within the forum itself* (*i.e.*,

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[8] Here, the Texas secretary of state transmitted process by mail. Pet. Br. at 11. Texas and federal law also authorize others to serve process, including some governmental agents. See TEX. R. CIV. P. 103 ("Process . . . may be served anywhere by . . . any sheriff or constable or other person authorized by law . . . ."); FED. R. CIV. P. 4(e)(1) (generally allowing service to be accomplished pursuant to state law, unless provided otherwise by federal law); FED. R. CIV. P 4(c)(3) (by court order, service may be effected by a United States marshal).

prior to the transmission abroad of any documents).

Menon's argument that service by mail is bad policy is also contradicted by the extrinsic evidence showing that the treaties leading up to the Convention were understood to permit such service, that no change was intended by the Convention, and that, in fact, the signatories shared the expectation that service by mail was permitted absent objection. Pet. Br. at 26-37. As above, such extrinsic evidence is relevant here not as an aid to interpreting the treaty's language, but to refute Menon's argument that service by mail is inherently unreasonable as a policy matter.

Of course, if a signatory had concerns about the reliability of service by mail, the Convention provides a process for objecting to that provision. Convention, Arts. 10(a), 21 (J.A. 8, 13). And even absent objection, Articles 15 and 16 of the Convention limit the entry and finality of default judgments against defendants who did not receive actual notice of the proceedings. J.A. 10-12. Article 15 provides that a default judgment may not be entered unless a defendant was either served by a method allowed in the defendant's own State or the document was actually and timely delivered to the defendant or the defendant's residence,[9] while Article 16 provides that a defendant may appeal an otherwise final judgment within a reasonable time after actual notice of the judgment if the defendant lacked actual notice of the underlying proceedings and

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[9] Article 15 does authorize a State to permit entry of a default judgment absent proof of service (after a six-month waiting period) if "every reasonable effort has been made to obtain [such proof] through the competent authorities of the State addressed." J.A. 10.

presents a *prima facie* defense on the merits.[10] *Ibid.*

Menon also invokes the canon that presumes different words mean different things. Resp. Br. at 30 (citing *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). But if other traditional interpretive tools lead to the conclusion that Water Splash's view is at least reasonable, the *Russello* canon should not be given determinative weight and render unreasonable an otherwise reasonable interpretation, especially where considerations of *stare decisis* are involved. Cf. *Richlin Sec. Serv. Co.* v. *Chertoff*, 553 U.S. 571, 589 (2008) ("The sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction."); *ibid.* (relying on "traditional tools of statutory construction and considerations of *stare decisis*" and declining to "resort to the sovereign immunity canon because there is no ambiguity left for us to construe").

In other words, while the *Russello* canon might provide a basis for *one* reasonable interpretation of a

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[10] Menon argues that "American courts will . . . not allow for enforcement of default judgments based on mail if there is no actual notice." Resp. Br. at 47 (citing *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988)). But under federal law, a default judgment may be enforceable absent actual notice if the notice given was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Jones* v. *Flowers*, 547 U.S. 220, 226 (2006) (internal quotation marks omitted); see *ibid.*, at 226 ("Due process does not require that a property owner receive actual notice before the government may take his property."). Absence of valid service of process, however, does render a judgment void. *See Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988).

treaty, it should not itself cancel a competing interpretation that is also reasonable and derives from other tools of interpretation that rely on intrinsic evidence of intent. Moreover, if anything, the *Russello* canon in particular should receive less weight than the canon against surplusage because the presumption that "words mean something" is at least logically more fundamental than the presumption that "different words mean different things."

Finally, as already noted, the limited scope of the Convention under *Schlunk* rebuts the *Russello* presumption, and even if the Convention's scope were not so limited, that presumption could still be satisfied if "send" were read to include both service and non-service transmittals. Pet. Br. at 24 & n.24.

II. Menon's view that "send" means "service of post-answer documents" is unreasonable.

Menon claims that service of process by mail is not permitted under Article 10(a), but then claims Article 10(a) does permit service, but of post-answer documents only:

> "[I]t is not absurd to include a provision on direct mail regarding service of post-answer judicial documents (such as motions or discovery) within a Convention that seeks to simplify the procedures by which judicial documents are served. In fact, it is quite logical to include in the same place provisions for service of both types of judicial documents .... Moreover, it would be natural to provide by treaty for both types of service because of the need, in both situations, for one nation's legal process to encroach upon the territorial jurisdiction of another, but only by consent to do so.....

> Because there is a logical reason for the text to deviate – namely, to provide for service of both type of judicial documents – and the text of Article 10 read in its ordinary manner leads to the conclusion that service of both type of judicial documents are contemplated, the Court should conclude that the text of Article 10 is unambiguous and that the variation between 'send' and 'effect service' was not 'an obvious drafting error.'"

Resp. Br. 30-31. As next shown, Menon's reading is unreasonable because (a) it is unsupported by the text of the Convention and (b) it introduces ambiguity regarding the meaning of other Convention terms ("service" and "judicial documents"), whose resolution by extrinsic evidence does not support Menon's position.

A. The text of the Convention does not distinguish between service of process and service of post-answer documents.

If the Convention applies to a particular document – *i.e.*, because it is a "judicial" or "extrajudicial" document that forum law requires to be transmitted abroad for "service" – then it must be "served" according to the Convention. *Schlunk*, 486 U.S., at 700 ("If the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies.").

But nothing in the text or structure of the Convention purports to make makes any distinction between service of process and service of other ("post-answer") documents. Thus, whether mail is permissible for service under Article 10(a) cannot depend—at least under the text of the Convention—on whether a judicial

document is process or not. Put another way, if mail is an impermissible means for serving a summons, there is no textual basis to say that mail is somehow permitted for serving a post-answer judicial document where "service" is required.

Rather, to adopt Menon's view, one must either (1) read Article 10(a) such that "send" actually means "serve" but "judicial documents" means—in Article 10(a) alone—"post-answer judicial documents," or (2) break the concept of "service" into two types of service: government-assisted or -initiated service (hereinafter, *"official service"*) versus party-initiated service (hereinafter, *"private service"*).

As to reading (1), the idea that "judicial documents" means something different in Article 10(a) than in the rest of the Convention is unsupported by any intrinsic evidence and violates the canon that identical terms are presumed to mean the same thing each time they are used.[11] (That said, this reading otherwise inherently supports Water Splash's point that the word "send" is at least broad enough to embrace the concept of legal "service." Pet. Br. at 23 n.23.)

With respect to reading (2), Menon argues that the Convention's drafters would have had a reasonable basis to differentiate methods for serving process versus methods for serving post-answer documents based on a distinction between official and private service as defined above. Resp. 33. And to be sure, under both

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[11] *Utility Air Regulatory Group* v. *E.P.A.*, 134 S. Ct. 2427, 2441 (2014) ("One ordinarily assumes that identical words used in different parts of the same act are intended to have the same meaning." (internal quotation marks omitted)).

Texas and federal law, service of "process" requires involvement of at least one or more governmental actors,[12] while many, perhaps most,[13] post-answer documents may be served by private (party to party) transmittals.[14]

Water Splash agrees that a distinction between official and private service could have been a reasonable one for drafters of a service convention to make. But there is no textual support in the Convention suggesting that the drafters actually intended any distinction between process and other judicial documents, or between methods of serving one versus the other. The text of the Convention simply reflects no such distinctions.[15]

B. Menon's view is also based on unsupported assumptions regarding the meaning of other Convention terms.

Apart from being unsupported by the intrinsic evidence, Menon's view actually raises two additional interpretive questions. First, whether the term "service" itself is ambiguous. Based on Menon's argument, one

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[12] See, *supra*, at p. 7-8 & n.8.

[13] Service of some post-answer litigation documents, however, ordinarily involves a governmental actor, such as any post-answer documents that issue from the court itself (*e.g.*, orders, judgments), with some requiring additional official involvement (*e.g.*, writs of execution). See TEX. R. CIV. P. 629; FED. R. CIV. P. 4.1.

[14] See TEX. R. CIV. P. 21a(a)(2); FED. R. CIV. P. 5.

[15] The Convention limits the circumstances where a default judgment may be avoided to situations where "a writ of summons or an equivalent document" had to be served abroad. See Convention, Arts. 15, 16 (J.A. 10-12). But that reference to a process document does not make any distinction regarding types of service.

might question whether "service" under the Convention embraces both official and private service or is limited to official service. The Convention does not define "service" and general definitions do not obviously restrict its meaning to one type or the other. For example, Black's Law Dictionary (10th ed. 2014) defines "service" as "[t]he formal delivery of a writ, summons, or other legal process, pleading, or notice to a litigant or other party interested in litigation," which sounds like "official" service. But it also gives a more general definition – "the legal communication of a judicial process" – which might describe both official and private service. *Ibid.*

Second, Menon's view raises the question whether the term "judicial document" is ambiguous. Menon broadly uses this term to include all documents relating to a litigated matter, whether the document (1) was issued from a court (such as a summons, order, judgment, or writ of execution); (2) was filed with the court by a litigant (such as a pleading or motion); or (3) was exchanged between parties, even without a court filing (such as many discovery requests and responses). Resp. Br. at 30.

Black's Law Dictionary (10th ed. 2014) defines "judicial document" slightly differently, so as to cover both categories (1) and (2): "[a] court-filed paper that is subject to the right of public access because it is or has been both relevant to the judicial function and useful in the judicial process," referencing a 2006 case for this definition. *Ibid.* (citing *Lugosch* v. *Pyramid Co. of Onandaga*, 435 F.3d 110, 119 (2d Cir. 2006)).

On its face, however, the term "judicial document" could at least reasonably be read to only mean a document in category (1): a document issuing from a court

(*i.e.*, a "judicial" document). Consistently, although the English text of the Convention uses the term "judicial documents," the French text, which is equally authentic,[16] uses the term "*actes judiciaires*."[17] The French word "*judiciaire*" translates to "judicial," but the French word "*acte*" translates to "act" or "certificate," rather than "document."[18]

In addition, the English term does not appear to be a frequently used term of art. Apart from *Schlunk*, the term "judicial document" apparently is used in only one other opinion of this Court, also in a context most consistent with category (1). See *Grin* v. *Shine*, 187 U.S. 181, 190 (1902) (discussing extradition treaty which provided that "when the person whose surrender is asked shall be merely charged with the commission of an extraditable crime or offense, the application for extradition shall be accompanied by an authenticated copy of the warrant of arrest or of some other equivalent judicial document").

And extrinsic evidence supports a definition limited to documents issuing from a judicial official or other authority. According to the Hague Conference's most recent handbook:

> "Judicial documents for the purposes of the Convention are instruments of contentious or non-contentious jurisdiction, or instruments of

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[16] Pet. Br. at 28 n.27.

[17] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) (French), *available at* https://www.hcch.net/fr/instruments/conventions/full-text/?cid=17.

[18] See COLLINS FRENCH-ENGLISH DICTIONARY, *available at* https://www.collinsdictionary.com.

enforcement."

PRACTICAL HANDBOOK (2016) at 29 ¶ 77. The handbook also lists specific examples of judicial documents, all but one of which ("the defendant's reply") would appear to be documents issuing from a judicial or other authority:

> "Judicial documents include writs of summons, the defendant's reply, decisions and judgments delivered by a member of a judicial authority, as well as summons for witnesses and expert witnesses abroad, and requests for discovery of evidence sent to the parties even if these are orders delivered as part of evidentiary proceedings."

Ibid. (footnotes omitted).[19] The idea that judicial documents issue from a judicial officer or other authority is also implied by the handbook's discussion of forum law:

> "Characterisation as a judicial or extrajudicial document depends on the law of the requesting State (State of origin). This seems to be indisputable since it is that law which determines the power of the authorities and judicial officers to issue a given document, and which determines whether there is occasion to transmit the

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[19] The handbook did criticize a state court decision for construing "judicial documents" to exclude all post-summons documents. See PRACTICAL HANDBOOK (2016) 31 ¶ 81 (citing *Chabert* v. *Bacquie*, 694 So. 2d 805, 812 (Fla. Dist. Ct. App. 1997)). But that criticism was consistent with a definition limiting judicial documents to those issued by a judicial official or other authority, as the post-summons document at issue in *Chabert* was a statement of appeal that local law required to be transmitted for service by a judicial official. 694 So. 2d, at 812.

document for service abroad."

Id., at 30 ¶ 80 (emphasis removed).

Yet if "judicial documents" are limited to litigation-related documents issuing from a judicial or other official, then occasions for "service" under the Convention would be more limited than Menon suggests and, at least with respect to domestic practice, would seem to exclude most of the "privately" served documents that Menon mentions (motions, discovery). Resp. Br. at 30.

To be clear, whether this means "service" was intended to be limited to "official service" or whether "judicial documents" was intended to be limited to documents issuing from a judicial or other authority, Water Splash's point here is simply that Menon's reading is not supported by the intrinsic evidence of intent: (1) the idea that "send" means "private service of post-answer documents" is unsupported because the treaty does make such distinctions between types of service or types of judicial documents; and, more generally, (2) the idea that the drafters intended to make such distinctions itself makes assumptions about the meaning of terms the Convention does not define ("service," "judicial documents") and that do not obviously follow from their ordinary meanings in English and French or the extrinsic evidence cited above. For these reasons, Menon's competing interpretation of Article 10(a) is not reasonable.

III. When interpreting an unclear treaty, extrinsic evidence should not be displaced by a canon of construction.

Menon suggests that the Court has not squarely answered whether extrinsic evidence may be considered in the face of an unambiguous treaty. Resp. Br.

at 7. On the one hand, some historical statements by this Court have suggested that extrinsic evidence may be relevant even absent textual ambiguity in some limited circumstances. See *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 180 (1982) ("The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.' (quoting *Maximov* v. *United States*, 373 U.S. 49, 54 (1963)). On the other hand, the Court more recently held that, when confronted by unambiguous text, a treaty's drafting history was off limits:

> "We must thus be governed by the text—solemnly adopted by the governments of many separate nations—whatever conclusions might be drawn from the intricate drafting history that petitioners and the United States have brought to our attention. The latter may of course be consulted to elucidate a text that is ambiguous . . . . But where the text is clear, as it is here, we have no power to insert an amendment."

Chan v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989). Thus, absent at least some ambiguity, resort to extrinsic evidence of intent may be precluded, apart from potentially "absurd" results.[20]

Since *Chan*, however, this Court has at least noted the historical principle that "treaties are construed

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[20] Menon acknowledges that a court may ignore the plain meaning of a treaty's language to prevent an absurd result. Resp. Br. at 25 n.17, 36-37, 42.

more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 535 (1991); see also *Factor* v. *Laubenheimer*, 290 U.S. 276, 293 (1933) (collecting cases).

One way to reconcile these interpretative concepts would be to consider extrinsic evidence in connection with, rather than apart from, some canons of construction. In other words, in the face of at least some textual uncertainty, a canon of statutory construction like the one in *Russello* should not trump extrinsic evidence.[21] Cf. *Richlin Security Service Co.* v. *Chertoff*, 553 U.S. 571, 589 (2008) ("The sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction."); Vienna Convention on the Law of Treaties (1969) § 3, 1115 U.N.T.S. 331 (providing principles of interpretation without reference to canons of construction).

To be sure, the United States has not ratified the Vienna Convention on the Law of Treaties, and that treaty also post-dates the drafting of the Hague Service Convention. Even so, it at least suggests that the elevation of particular statutory interpretative canons above extrinsic evidence may be debatable as a means of understanding the objective intentions of drafters of multilateral treaties.

Again, Water Splash is not asking the Court to

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[21] Here, the court of appeals applied the *Russello* canon to the exclusion of extrinsic evidence. Pet. Br. at 15-16.

consider extrinsic evidence absent at least some determination that the meaning of the intrinsic evidence is "uncertain." See BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "ambiguity" as "[d]oubtfulness or uncertainty of meaning or intention, as in a contractual term or statutory provision; indistinctness of signification, esp. by reason of doubleness of interpretation."). But if treaties are different from both statutes and private contracts, and if that difference supports a more flexible form of interpretation as historically indicated, then the approach discussed above at least avoids the separation of powers concerns raised by Menon.

Water Splash otherwise responds to some of Menon's subsidiary points as follows:

Menon notes that treaties which are not self-executing have no effect under domestic law absent implementing legislation. Resp. Br. 9, 10 n.7, 14, 23. While that may be relevant in other cases, it is not relevant here because the Hague Service Convention is self-executing given this Court's holding that "the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies." *Schlunk*, 486 U.S., at 699 (citing Supremacy Clause, U.S. Const., Art. VI). Indeed, Menon's ability to challenge whether service complied with the Convention inherently depends on this.

Menon also states that "The Constitution places the law-making function in the case of treaty formation on the President as negotiator of a treaty and on the legislature as adopting the treaty." Resp. Br. at 10. In the case of a self-executing treaty, however, Congress's role is limited to the Senate's advice and consent to the President's ratification of the treaty.

And as previously shown, such consent was given here only after the Executive Branch informed the Senate that the treaty in question allowed service by mail, a position the Executive Branch has maintained. Pet. Br. at 32-34.

Menon argues that giving special weight to the Executive Branch's interpretation of a treaty or to the views of foreign courts usurps the judiciary's obligation to say what the law and constitutes a prohibited application of customary international law. Resp. Br. at 13-28. But at least where meaning is uncertain, examining such extrinsic evidence is not delegating a legal decision to the Executive Branch or applying international law. It is just a way of gathering additional evidence of intent, the ultimate issue in matters of interpretation. Moreover, it is hard to imagine any workable alternative absent nullifying unclear instruments, a solution historically employed in only limited circumstances. See *United States* v. *Harriss*, 347 U.S. 612, 617 (1954) (explaining that a criminal statute is void if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute").

IV. If the court of appeals' decision is reversed, remand is procedurally appropriate.

Menon does not contend that the validity of service under Quebec law is relevant to the federal question presented, and Water Splash previously argued that it is not. Cert. Reply at 3-6. Water Splash has also taken the position that Menon did not present and preserve any issue related to Quebec law in the lower courts that could affect the validity of service in this case (*e.g.*, on some state law comity basis). *Id.*, at 6-7. However, since the court of appeals only addressed the

federal question presented, Water Splash does not dispute, as a procedural matter, that the case may be remanded for consideration of any preserved but unaddressed issues if the court of appeals' judgment were reversed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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